



June 16, 2022

Hon. Steven Tiscione
United States Magistrate Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Kocan v. Frenesco, Inc., et al.*
Docket No.: 22-cv-01548 (ST)

Dear Judge Tiscione:

This firm represents the Plaintiff in the above-referenced action brought against his former employer for alleged violations of the Fair Labor Standards Act (“FLSA”) and New York Labor Law. D.E. 1. The parties have reached an agreement to settle this action. Accordingly, Plaintiff now submits this motion for approval, pursuant to Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199 (2d Cir. 2015), to respectfully request that the Court approve the terms of the parties’ settlement agreement with respect to Plaintiff’s FLSA claims. The parties’ proposed Settlement Agreement and Release (the “Agreement”) is attached as Exhibit A. In light of the parties’ settlement, the parties respectfully request that the initial conference scheduled for June 28, 2022, and all other obligations and deadlines, be canceled.

On March 21, 2022, Plaintiff filed the instant federal action asserting claims for failure to pay overtime under the FLSA and NYLL, failure to furnish accurate wage statement NYLL § 195(3), and failure to provide compliant wage notices under NYLL § 195(1). D.E. 1. On May 3, 2022, Defendants filed an Answer denying Plaintiff’s allegations. After exchanging this relevant informal discovery, the parties engaged in arms’ length negotiations. Thereafter, the parties negotiated the terms of their formal settlement agreement. The settlement agreement between the Plaintiffs and the Defendants provides for payment of a gross sum of \$10,000.00, inclusive of attorneys’ fees and costs. Pursuant to the Agreement, Plaintiff will receive a total of \$6,337.00, and Plaintiffs’ counsel will receive a total sum of \$3,663.00, consisting of \$3,164.00 for attorneys’ fees (i.e. 1/3 of the net settlement amount after deducting costs from the gross settlement amount) and \$499.00 for litigation costs.

The Court Should Approve the Settlement Agreement as Fair and Reasonable

FLSA claims may be dismissed with prejudice under Fed. R. Civ. P. 41 if they are approved by the Court. Cheeks, 796 F.3d at 206-207. “Courts approve FLSA settlements when they are reached as a result of contested litigation to resolve bona fide disputes.” Hernandez v. Merrill Lynch & Co., 2013 WL 1209563, at *7 (S.D.N.Y. Mar. 21, 2013) (citations omitted). “Typically, courts regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of settlement.” Id. (citation omitted). Furthermore,

“[i]f the proposed settlement reflects a reasonable compromise over contested issues, the settlement should be approved.” Id.

In evaluating a proposed settlement of FLSA claims, courts in this Circuit typically apply the five-factor test articulated in Wolinsky v. Scholastic, Inc., 900 F. Supp. 2d 332, 335 (S.D.N.Y. 2012). The Wolinsky factors require consideration of the following factors: (1) the Plaintiffs’ range of possible recovery; (2) the extent to which the settlement will enable the parties to avoid anticipated burdens and expenses in establishing their respective claims and defenses; (3) the seriousness of the litigation risks faced by the parties; (4) whether the settlement agreement is the product of arms’-length bargaining between experienced counsel; and (5) the possibility of fraud or collusion. Id.

Based on a review of the relevant records, Plaintiff’s maximum potential recovery for unpaid wages is \$3,894.26. Accordingly, Plaintiff’s net recovery after attorney’s fees will exceed the amount that he is owed for unpaid overtime wages. Additionally, Defendants contend that Plaintiff is not entitled to liquidated damages because Plaintiff cannot establish that the alleged violations, if proven, were willful. Settling at this stage allows the parties to avoid substantial costs and delays. Indeed, were a settlement not reached at this stage, the parties would have engaged in the remaining formal written and document discovery, and depositions of Plaintiff, Defendants, and likely several non-party witnesses. This settlement also avoids potential motions for summary judgment and a time consuming and risky trial, which could result in a months’ or years’ long delay to obtaining a potential recovery for the Plaintiff. Even if Plaintiff were to prevail on his FLSA overtime wage claims, Defendants could prove that they made a good faith effort to comply with the FLSA, Plaintiff would not be entitled to liquidated damages under the FLSA. Thus, by settling at this stage, Plaintiff is ensured a substantial recovery in this matter. Accordingly, although there is a possibility that Plaintiff could recover higher damages if the case proceeded to trial, there is also the significant possibility that he could receive lower damages, or nothing at all, and as such, the risks and uncertainties discussed above are substantial. Thus, assuming this settlement is approved, Plaintiff will be able to recover the settlement funds more expeditiously, and with more certainty, than a trial judgment.

Furthermore, the settlement agreement does not contain any terms that would militate against the Court approving it. For instance, the release in the Agreement is limited to wage-related claims. The release does not fall into the category of releases that are so broad and encompassing as to be rejected because they run afoul of standards of fairness and reasonableness. See Flood v. Carlson Rests. Inc., 2015 WL 4111668, at *1-2 (S.D.N.Y. July 6, 2015); Lopez v. Nights of Caboria, LLC, 96 F. Supp. 3d 170, 181 (S.D.N.Y. March 30, 2015) (prohibiting releases that “purport to waive practically any possible claim against the defendants, including unknown claims and claims that have no relationship whatsoever to wage-and-hour issues” but notes additional claims may be released in appropriate circumstances); Cheeks, 796 F.3d at 206 (noting judicial approval of settlements is necessary to avoid an “overbroad release” that waives all possible claims and to prevent potential abuse or overreach in settlements). Here, the release is narrowly tailored to release only claims relevant to the instant action. Likewise, the agreement does not contain a confidentiality clause that may “run afoul of the purposes of the FLSA and the public’s independent interest in assuring that employees’ wages are fair.” Flood, 2015 WL 4111668, at *1 (citing Lopez, 96 F. Supp. 3d at 177-181); Cheeks, 796 F.3d at 206 (quoting Lopez, 96 F. Supp. 3d at 177)

(noting judicial approval of settlements is necessary to prevent “‘highly restrictive confidentiality provisions...in strong tension with the remedial purposes of the FLSA’”); Cortes v. New Creators, Inc., 2016 WL 3455383, at *4 (S.D.N.Y. June 20, 2016) (citing Lopez, 96 F. Supp. 3d at 177-181). Moreover, the Agreement does not contain a non-disclosure provision. The parties have agreed to a mutual non-disparagement provision.

The Court Should Approve the Requested Attorneys’ Fees and Costs as Reasonable

In addition to assessing the reasonableness of the settlement award, most courts since *Cheeks* have found that courts “must also assess the reasonableness of any attorneys’ fee award.” Velasquez v. SAFI-G, Inc., 137 F. Supp. 3d 582, 585 (S.D.N.Y. Oct. 7, 2015) (citing Wolinsky, 900 F. Supp. 2d at 336). When courts examine attorneys’ fee awards in FLSA settlements, it is “to ensure that the interest of plaintiffs’ counsel in counsel’s own compensation [did not] adversely affect the extent of the relief counsel [procured] for the clients.” Lliguichuzhca v. Cinema 60, LLC, 948 F. Supp. 2d 362, 366 (S.D.N.Y. 2013) (citing Wolinsky, 900 F. Supp. 2d at 336). In this case, the portion of the settlement amount attributable to attorneys’ fees is one-third of the net settlement amount after deducting for litigation costs.

Notably, while Courts may now award attorneys’ fees in amounts greater than one-third of the total settlement sum, plus costs, Fisher v. SD Prot. Inc., 948 F.3d 593 (2d Cir. 2020), Courts have traditionally held that approval of attorneys’ fees of 1/3 of the settlement sum, plus costs, is reasonable and routinely approve such terms in settlement agreements. Tiro v. Public House Investments, LLC, 2013 WL 4830949, at *14 (S.D.N.Y. Sept. 10, 2013) (collecting cases); Kochilas v. Nat’l Merchant Servs., Inc., 2015 WL 5821631, at *8 (E.D.N.Y. Oct. 2, 2015) (collecting cases); McDaniel v. City of Schenectady, 595 F.3d 411, 417 (2d Cir. 2010) (noting that the percentage of recovery method is “the trend in this Circuit.”); see also Oxley v. Excellent Home Care Servs., LLC, 2020 WL 589581, at *3 (E.D.N.Y. Jan. 8, 2020), report and recommendation adopted, 2020 WL 401772 (E.D.N.Y. Jan. 23, 2020) (citing Romero v. Westbury Jeep Chrysler Dodge, Inc., 2016 WL 1369389, at *2 (E.D.N.Y. Apr. 6, 2016)) (noting “courts in this Circuit have routinely found an award representing one third of the settlement amount to be reasonable” in FLSA settlements and awarding plaintiff’s counsel a fee of 1/3 of the net settlement after costs, plus an award of costs); Yong Yuan Wang v. Mandarin Glen Cove, Inc., 2019 WL 5695910, at *2-3 (E.D.N.Y. Sept. 30, 2019) (citing Romero, 2016 WL 1369389, at *2) (same); Meza v. 317 Amsterdam Corp., 2015 WL 9161791, at *2 (S.D.N.Y. Dec 14, 2015) (“[C]ourts regularly approve attorney’s fees of one-third of the settlement amount in FLSA cases.”) (collecting cases); Cregg v. Firstservice Residential N.Y., Inc., Docket No. 15-cv-3876-LB, D.E. 14 at *4-5 (E.D.N.Y. Dec. 9, 2015) (approving one-third attorneys’ fees award as “the norm in this Circuit”); Najera v. Royal Bedding Co., LLC, 2015 WL 3540719, at *3 (E.D.N.Y. June 3, 2015) (collecting cases); Calle v. Elite Specialty Coatings Plus, Inc., 2014 WL 6621081, at *3 (E.D.N.Y. Nov. 21, 2014) (“[O]ne-third contingency fee is a commonly accepted fee in this Circuit.”); Rangel v. 639 Grand St. Meat & Produce Corp., 2013 WL 5308277, at *1 (E.D.N.Y. Sept. 19, 2013) (observing that in FLSA cases, district courts in the Second Circuit routinely approve of fees that amount to one-third of the total recovery, plus costs). Courts have held that a one-third recovery is appropriate in a case where, as here, Plaintiffs’ counsel’s fee entitlement is entirely contingent upon success of a settlement or award. See Massiah v. MetroPlus Health Plan, Inc., 2012 WL 5874655, at *8 (S.D.N.Y. Nov. 20, 2012) (collecting

cases) (one-third recovery is “presumptively reasonable” where “Counsel’s fee entitlement is entirely contingent upon success”). Thus, Plaintiffs’ counsel’s requested fees of one-third of the net settlement sum after deducting for litigation costs is certainly reasonable.

Here, Plaintiffs’ counsel investigated the Plaintiff’s claims, conducted a detailed inquiry regarding Plaintiff’s job duties, their hours worked and compensation received, and Defendants’ compensation policies, and subsequently negotiated a settlement. Due to the contingent nature of the case, Plaintiff’s counsel undertook these efforts with no ultimate guarantee of compensation and facing substantial risk given the alleged exemption. Plaintiff’s counsel was zealous in the pursuit of Plaintiff’s litigation objectives and secured a favorable result on the Plaintiff’s behalf. The settlement will be made available to the Plaintiff without the uncertainty and delay of trial, or the risk that a judgment may be unable to be collected after a successful trial.

In light of the foregoing, Plaintiff respectfully requests that the Court approve the parties’ settlement and dismiss this matter with prejudice, while retaining jurisdiction over matter to enforce the terms of this settlement.

We thank the Court for its consideration of these requests.

Respectfully submitted,

/s Peter A. Romero, Esq.

PETER A. ROMERO

cc: All Counsel of Record *via* ECF